MEMORANDUM FOR: Director of Central Intelligence

FROM: Stanley Sporkin
General Counsel

SUBJECT: Criminal Code Reform Legislation

1. For sixteen years the Congress has been attempting a comprehensive revision of the federal Criminal Code. In the current Congress, three Criminal Code reform Bills, S. 1630, H.R. 1647, and H.R. 4711 are under active consideration. In the fall of 1981, the Office of Management and Budget requested the Agency's views on S. 1630. At about the same time Attorney General William French Smith gave a speech in which he expressed support for quick enactment of the revised Criminal Code. You sent letters to OMB Director David Stockman (Tab A) and Attorney General Smith (Tab B) advising them that S. 1630 posed difficulties for the Intelligence Community and that the Administration should not express support for the legislation until the Community's concerns were properly addressed. The Attorney General replied (Tab C) that the Department of Justice would consider our views and work with us to resolve our concerns. Subsequently, you sent detailed views to the Attorney General (Tab D) and to OMB in the form of a request for clearance of letters to the Chairmen of the Senate Intelligence and Judiciary Committees (Tab E). OMB has not yet cleared these letters for transmittal to the Chairmen. The Attorney General, did, however, reiterate his commitment to work with us in resolving our concerns (Tab F).

2. The letters on Criminal Code reform legislation request two amendments to the legislation which the Intelligence Community has sought in the past several sessions of Congress. The first amendment, of particular importance to the National Security Agency, strengthens the provisions of the Criminal Code prohibiting unauthorized disclosure of codes and communications. The second amendment, a component of the CIA and Intelligence Community Legislative Program submitted to the President with the Fiscal Year 1983 NFIP Budget, would establish for the first time federal criminal penalties for violent attacks upon intelligence personnel, as well as certain defectors and foreign visitors. This provision was passed by the Senate as part of the FY 1982 Intelligence Authorization Act, but it was dropped in Conference. HPSCI Chairman Boland has introduced the proposal as separate legislation in the House (H.R. 4940).

3. In addition to these two amendments, we proposed adding to the revised Criminal Code the following provision:

> "Nothing in title 18, United States Code, or any other federal criminal statute shall be construed to create criminal liability for the conduct of intelligence activities by a federal public servant that are authorized and conducted in accordance with the Constitution and applicable federal statutes, Executive Orders, presidential directives, and departmental or agency regulations, which regulate the conduct of intelligence activities."

This provision is designed to ensure that intelligence personnel are not subject to criminal liability for carrying out properly authorized and conducted intelligence activities. Absent such a provision, enactment of S. 1630 would subject intelligence personnel to great legal uncertainties, possibly interfering with the conduct of our intelligence mission.

4. The provisions of S. 1630 1/establish, for the first time in federal criminal law, general extraterritorial jurisdiction over the conduct of nonmilitary federal "public servants" who are outside the United States because of their official duties.2/ Our concern is best illustrated by the fact that conduct defined by S. 1630 as criminal offenses of Theft, Trafficking in Stolen Property, Receiving Stolen Property, and Executing a Fraudulent Scheme, when combined with the new extraterritorial jurisidiction provision, could in certain circumstances be construed to prohibit intelligence officers from clandestinely acquiring foreign documentary materials or other property of foreign intelligence value. The provisions of S. 1630 might also be construed to apply in some circumstances in which we properly conduct foreign intelligence activities in the United States.

1/Sections 201(b)(1)(B) and 204(i) (see provisions at Tab G).

2/Section 111 of the Bill defines public servant as follows: "'Public servant' means an officer, employee, adviser, consultant, juror, or other person authorized to act for or on behalf of a government or serving a government in a civil or military capacity, and includes a person who has been elected, nominated, or appointed to be a public servant; a federal 'public servant' does not include a District of Columbia public servant;" Under this definition "federal public servant" would include CIA officers and employees abroad performing official duties, as well as agents.

If the provisions of S. 1630 were interpreted to apply to U.S. intelligence officers doing their legitimate intelligence duties, we might have to reduce our activities considerably. The language which we proposed would make clear that the Criminal Code is not meant to prohibit authorized intelligence activities.

5. If S. 1630 were to be enacted without the language which we proposed, only two things would stand between our officers doing their jobs and criminal liability: the discretion of federal prosecutors and the defense of exercise of public authority. No intelligence officer should be put in the position of facing even the theoretical possibility of prosecution for carrying out his assigned, legitimate duties. The defense of public authority, moreover, rests upon a rather scanty foundation of federal case law.3/

6. The provision which we recommended to the Attorney General would place in the Criminal Code a clear statement that intelligence officers do not commit offenses defined by the Criminal Code when they engage in activities which are both authorized and conducted in accordance with the Constitution and the statutes, Executive Orders, Presidential Directives, and agency regulations which govern intelligence activities. The provision would not protect an intelligence officer engaged in an improper intelligence activity, nor would the provision itself authorize any intelligence activity.

7. I recommend that you continue to maintain the basic validity of the position that we have expressed to the Attorney General. We should, of course, be ready to discuss with the Justice Department and with the Congress whether it might be possible to handle our concerns with different language than that which we have suggested. We should maintain, however, that we cannot be expected to fulfill our intelligence mission effectively if uncertainties on the order of those which the law would contain if S. 1630 were enacted place clouds of potential illegality over intelligence activities which have heretofore been considered proper, lawful activities.

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Attachments

3/ United States v. Clark, 31 F. 710 (E.D. Mich. 1887); United States v. Lipsett, 156 F. 65 (W.D. Mich. 1907). No more modern opinions exist for the public duty defense to a criminal prosecution. The Supreme Court has, however, developed strong theories of official immunity in the content of civil actions, which may indicate some willingness to stand behind the much less well-developed theory of a public authority defense in criminal prosecutions.